



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 030535/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES.

DATE: 15 July 2024

In the matter between: -

ABSA BANK LIMITED

Plaintiff

and

BEST ACCOUNTS & TAX PROFESSIONALS (PTY) LTD
(REGISTRATION NUMBER: 2022/585244/07)

First defendant

MPOFU, DOUGLAS

Second defendant

MPOFU, NTOMBI FUTHI JOYCE

Third defendant

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 15 July 2024.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] The plaintiff applies for summary judgment against the first defendant, the principal debtor and its sureties, the second and third defendants, in respect of an overdraft facility of R1 290 000.00 granted to the first defendant.

[2] The issues for determination were crystallised as follows in a joint practice note: -

[2.1] Whether the plaintiff failed to comply with rule 17(3);

[2.2] Whether the plaintiff failed to comply with section 129 of the National Credit Act, 34 of 2005 ("**the NCA**");

[2.3] Whether cancellation of the agreement was permitted;

[2.4] Whether the counterclaim can derail the summary judgment proceedings.

[3] The defendants' opposing affidavit was filed out of time. In the interest of justice this Court permitted into evidence.

SPECIAL DEFENCES

[4] The defendants raised two special defences, namely: -

[4.1] That the plaintiff did not comply with the provisions of rule 17(3)(a) in that the plaintiff's postal and email address were not included in the summons and particulars of claim, which omissions render the summons irregular;

[4.2] The summons was issued prematurely in that the summons could not have been issued prior to having advised the defendants of their rights under section 129 of the NCA and that section 130 of the NCA prohibits the institution of the action until the requirements of section 130(1) have been complied with.

Rule 17(3)

[5] Rule 17(3)(a) reads as follows: -

"Every summons shall be signed by the attorney acting for the plaintiff and shall bear an attorney's physical address, within 15 kilometres of the office of the registrar, the attorney's personal address and, where available, the attorney's facsimile address and electronic mail address."

[6] A plain reading of the provisions of the subrule indicates that this rule only relates to a summons and not to a particulars of claim. The information complained about by the defendants does in fact appear on the summons, save for an email address which is not peremptory in any event as indicated in the subrule.

The summons was issued prematurely

- [7] In considering the second special defence it is apposite that the provisions of the NCA find no application to the transaction between the plaintiff and the first defendant. At paragraph 21 of the particulars of claim the plaintiff pleads that at the stage of the conclusion of the agreement, the first defendant's annual turnover, alternatively asset base exceeded an amount of R1 million, alternatively, the threshold amount referred to in section 7 of the NCA. In addition, the agreement is a large agreement in terms of section 4(1)(b) of the NCA. This should therefore be the end of the second special plea, but for the sake of completeness I deal with the balance of the NCA defences.
- [8] The defendants' interpretation of section 130 of the NCA cannot be correct. The section 129 notification is one of the events foreseen by section 130 under section 130(1)(b)(ii). However, there was no response to the section 129 notice, in which event section 130(1)(b)(i) has been satisfied.
- [9] As far as the section 129 notice defence is concerned, the defendants seem to suggest that there is a burden on the plaintiff of proving that the section 129 notice had been received by them. This is not what the section requires. It only requires that the notice must have been provided to the consumer.¹
- [10] Yet, the bigger challenge the defendants face is that the provisions of the NCA are not applicable to this particular transaction. If it were, the

¹ *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC).

defendants had a duty to make the necessary allegations in their affidavit resisting summary judgment. This would include detail or evidence to substantiate the stance that the NCA is applicable. A mere denial, as is the case in the plea, is not sufficient.²

[11] Accordingly I find all of the special plea defences without merit.

THE MAIN DEFENCE

[12] The object of rule 32 is to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. In certain circumstances, therefore, the law allows the plaintiff to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his defence before the court.³

[13] Despite the procedural changes effected to the provisions of Rule 32, the principles enunciated in *Breitenbach*⁴ still equally apply:

"... no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to

² See *NPGS Protection & Security Services CC v FirstRand Bank Ltd* 2020 (1) SA 494 (SCA) at 498 – 499A.

³ *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 232F

⁴ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E

the requirement of bona fides”.

[14] A *bona fide* defence is one that (1) good in law and (2) pleaded with sufficient particularity.⁵

[15] In considering the now amended Rule 32, it was held in *Tumileng*⁶ at para [13] that:

“... Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (ie an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in Maharaj and Breitenbach v Fiat SA as to what is expected of a defendant seeking to successfully oppose an application for summary judgment, therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant”.

[16] The defendants aver that the plaintiff's cause of action is founded on a cancellation of the agreement due to a breach. The plaintiff exercised its election to cancel the agreement by way of a letter dated 19 September 2022. The defendants contend that the plaintiff made an election to cancel the agreement a year prior to the date pleaded and which was not done due to a breach of the agreement, but premised on the

⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426C-D).

⁶ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC).

plaintiff's right of election not to continue with a contractual relationship.

[17] It was argued on behalf of the defendants that *Bredenkamp*⁷ is distinguishable from the facts in this matter. In *Bredenkamp* the appellants' accounts were closed by Standard Bank after it became aware that the United States Department of Treasury's office of foreign assets control listed Bredenkamp, the first appellant, as a specially designated national because of his alleged ties to the Zimbabwean Mugabe regime. Accordingly the court held that the defendant accepted the contractual term that entitled the bank to terminate the contracts on reasonable notice as fair and reasonable and therefore it was not in conflict with any constitutional values and as such, the complaint could only be limited to the exercise of the admittedly fair and valid contractual right.

[18] It is apposite though that it is not disputed that the plaintiff made an election to cancel the agreement during 2021. I was referred to a number of authorities by the defendants which forge the legal position that a party is bound to its election to cancel once such election has been made.⁸

[19] Consequently the defendants attempted to encourage this court to disregard the election to cancel during 2021 as it was not the case before court and to confine itself to the following requirements that have not been met by the plaintiff: -

⁷ *Bredenkamp & Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).

⁸ *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP); *Gordon N.O. v Standard Merchant Bank Ltd* 1983 (3) SA 68 (A) at 95.

[19.1] That the first defendant breached the agreement as pleaded;

[19.2] That the plaintiff obtained a right to cancel and seek immediate payment of the outstanding amount;

[19.3] That the plaintiff subsequently made the election, and as such is entitled to payment.

[20] The plaintiff attached to the particulars of claim the standard terms applicable to the agreement. Clause 5 (cancellation and repayment) provides as follows: -

*"5.1 Notwithstanding the provisions of clause 2 of the Commercial Terms, or any other provision in this Agreement, all amounts outstanding under this Agreement are repayable upon written demand by us and **any undrawn portion of the facility may be cancelled by us at any time.** Following demand and/or cancellation, no further utilisation of the Facility may be made.*
(Emphasis added)

[21] The standard terms clearly contain an absolute right to cancel the overdraft facility at any time. Strictly speaking, not even a contractual breach is required. Notwithstanding, the plaintiff raised certain breaches which resulted in cancellation. At paragraph 16 of the particulars of claim the plaintiff pleaded that the first defendant: -

[21.1] failed to make regular and sufficient deposits and credits into the overdraft facility to repay interest, costs, fees and charges debited and exceeded the facility limit;

[21.2] failed to provide the plaintiff with its audited financial statements

timeously as per the agreement.

[22] The aforesaid allegations are met by a bare denial in the defendants' plea.

[23] In the circumstances I find that the defendants have failed to raise a triable *bona fide* defense.

THE COUNTERCLAIM

[24] The defendants instituted a counterclaim for payment in the amount of R1 964 789.00.

[25] The first defendant contends that due to the plaintiff's cancellation of the agreement and the fact that the plaintiff ceased to provide products and services to the defendants, the defendants lost income. No further information is provided in the plea or in the affidavit resisting summary judgment.

[26] Whilst a counterclaim in an unliquidated amount may be a defence to a plaintiff's application for summary judgment, a defendant has to set out the grounds of the defence with sufficient particularity to satisfy the court that the defence is *bona fide*.⁹

[27] The existing authority allows a counterclaim to be considered in the same way as a plea, for the court to consider whether the counterclaim is frivolous, unsubstantial and intended only to delay.¹⁰

⁹ *AE Motors (Pty) Ltd v Levitt* 1972 (3) SA 658 (T).

¹⁰ *Du Toit v De Beer* 1955 (1) SA 469 (T) at 473; *HI Lockhat (Pty) Ltd v Domingo* 1979 (3) SA 696 (T) at 698; *Muller and Others v Botswana Development Corporation Ltd* 2003 (1) SA 651 (SCA).

[28] No allegations to sustain the counterclaim have been made and no allegations as to the computation of the quantum of the counterclaim were made.

[29] Accordingly I find that the counterclaim is not a bar to the granting of summary judgment in this matter.

COSTS

[30] I found no reason/s to deprive the plaintiff of its costs. The plaintiff sought costs on an attorney and client scale. This scale was contractually agreed and will therefore be enforced by this court.

ORDER

I accordingly grant an order in the following terms: -

Summary judgment is granted against the defendants jointly and severally, the one paying the others to be absolved for: -

1. Payment in the sum of R1 272 855.00;
2. Interest on the amount of R1 272 855.00 at the rate of 12.50 % (prime currently 9 % plus 3.5 %) linked per annum, calculated and capitalised monthly from 2 September 2022 to date of final payment, both days included;
3. Costs of suit on the scale as between attorney and client.



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 8 February 2024

DATE OF JUDGMENT: 15 July 2024

APPEARANCES:

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